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Traditional Unions and the New Worker in the Netherlands

Margreit Kraamwinkel

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Traditional Unions and the New Worker in the Netherlands

Cover Page Footnote

International Law; Commercial Law; Law

Traditional Unions and the “New Worker” in the Netherlands[†]

Margriet Kraamwinkel[‡]

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I. Introduction: Unions and the Changing Labor Force

Unions are a very important part of the Dutch corporatist version of the welfare state.¹ Both on a company- and on an industry-wide level, unions play a paramount role in collective bargaining.² Furthermore, the unions' central organizations are members of the influential advisory boards in the Dutch government. At the same time, the rate of union membership is declining. Some 25% of the workforce belong to unions.³ Thus, although unions are still supposed to represent all Dutch employees, they, in fact, represent only a small percentage of employees.

Meanwhile, the labor force is rapidly changing in the Netherlands. Two parallel developments can be traced. First, the workforce is becoming more and more heterogeneous.⁴ For example, the number of working women is rapidly increasing.⁵ In addition, minorities from the former colonies, such as Surinam and the Antilles, are looking for jobs in the Netherlands,⁶ as is the so-

¹ See *infra* notes 17-114 and accompanying text for this article's explanation of the role of unions in the Dutch corporatist welfare state.

² See *infra* notes 32-63 and accompanying text for a description of the role played by Dutch unions in the collective bargaining process.

³ See DE VAKBEWEGING NA DE WELVAARTSSTAAT [UNIONS AFTER THE WELFARE STATE] 32 (Bert Klandermans & Jelle Visser eds., 1995) [hereinafter Klandermans & Visser]; see also A.T.J.M. JACOBS AND G.J.J. HEERMA VAN VOSS, ELEMENTAIRE SOCIAAL RECHT [BASIC SOCIAL LAW] 180 (1996).

⁴ See Klandermans & Visser, *supra* note 3, at 39.

⁵ See *id.* at 12.

⁶ See PAUL DE BEER, HET ONDERSTE KWART. WERK EN WERKLOOSHEID AAN DE ONDERKANT VAN DE ARBEIDSMARKT [THE BOTTOM QUARTER. WORK AND UNEMPLOYMENT AT THE BOTTOM OF THE LABOR MARKET] 68-71 (1996).

called second generation of "guest workers"—mainly people from Turkish and Moroccan descent.⁷ Second, the nature of employment is changing.⁸ The life-long, full-time employment contract is rapidly disappearing.⁹ At the same time, all forms of flexible, part-time and short-term contracts are increasing.¹⁰

In this article, I will discuss the place of unions in the changing labor market. In Part II,¹¹ I will describe the way in which unions are involved in collective bargaining and in social and economic policy. In Part III,¹² I will describe the changes in the labor force and in the labor market. Part IV¹³ will discuss the decline of membership in Dutch unions. Part V¹⁴ of the article will examine the continuing importance of organizing for Dutch workers. Here, the problem for individual employees is that, in Dutch society, unions are very influential in industry-wide collective bargaining and in shaping industrial relations in the country. Therefore, membership in a traditional union means having at least one vote to influence union politics. But are unions—still predominantly white male organizations—the appropriate institutions to voice the interests of the "new workers?" In Part VI,¹⁵ I will examine the effects of identity politics on the unionization efforts for "new workers." This examination will raise two central questions. First, the question for unions is whether they want, and are they able to develop, a policy which takes the heterogeneous interests of the new workers into account. Thus, the problem is *whether*

⁷ See *id.* Guest workers are immigrants from the Mediterranean countries who came to work in the Netherlands in the 1960s and 1970s. They were expected to leave the country after having worked for several years.

⁸ See Klandermans & Visser, *supra* note 3, at 43.

⁹ See CBS, ENQUÊTE BEROEPSBEVOLKING [PROFESSIONAL POPULATION RETURNS] 8-20, 48-59 (1993-1994) [hereinafter CBS 93-94]; CBS, ENQUÊTE BEROEPSBEVOLKING [PROFESSIONAL POPULATION RETURNS] 7-17, 40-45 (1995-1996) [hereinafter CBS 95-96].

¹⁰ See MINISTER OF EMPLOYMENT AND SOCIAL AFFAIRS, POLICY PAPER ON FLEXIBILITEIT EN ZEKERHEID [FLEXIBILITY AND SECURITY] (Dec. 1995) [hereinafter FLEXIBILITY & SECURITY]; CBS 95-96, *supra* note 9, at 40-45.

¹¹ See *infra* notes 17-114 and accompanying text.

¹² See *infra* notes 115-65 and accompanying text.

¹³ See *infra* notes 166-88 and accompanying text.

¹⁴ See *infra* notes 189-211 and accompanying text.

¹⁵ See *infra* notes 212-43 and accompanying text.

and how to represent the "new worker." Second, the question for the new workers is whether to organize *within or without* the traditional trade union system. In Part VII,¹⁶ I will address the problem of how the traditional union can represent the new worker and how the new worker can benefit from the traditional union.

II. Unions in the Dutch Welfare State

A. Membership

Although only 25% of the Dutch labor force belongs to a union, most of the population thinks unions are very useful institutions.¹⁷ In general, both members and non-members contend that unions should and do promote the interests of all workers.¹⁸ Workers generally only become union members if they expect a direct result from membership, or if they work in surroundings where a union or union members are very active.¹⁹

Today, the average worker is no longer the blue-collar, white, full-time, male, sole breadwinner;²⁰ however, female, non-white, part-time, and young workers are still a minority among union members.²¹ Moreover, today, most of the male breadwinners have a (usually part-time) working partner.²² Many civil servants are union members.²³ Further, white-collar workers in industries like services and banking remain the least organized workers.²⁴

The rest of this section is dedicated to the role unions play in the Netherlands. I will start with a description of the freedom of association. I will move on to unions in collective bargaining, the

¹⁶ See *infra* notes 244-69 and accompanying text.

¹⁷ See Klandermans & Visser, *supra* note 3, at 59; H.L. BAKELS, SCHETS VAN HET NEDERLANDS ARBEIDSRECHT [OVERVIEW OF DUTCH LABOR LAW] 159 (1996).

¹⁸ See Klandermans & Visser, *supra* note 3, at 61.

¹⁹ See *id.* at 9.

²⁰ BAS VAN DEN PUTTE ET AL., PARTICIPATIE IN VAKBONDEN [PARTICIPATION IN UNIONS], Amsterdam, (University of Amsterdam, Sept. 1992), at 3 [hereinafter VAN DEN PUTTE ET AL.].

²¹ See Klandermans & Visser, *supra* note 3, at 34; VAN DEN PUTTE ET AL., *supra* note 20, at 16, 19.

²² See VAN DEN PUTTE ET AL., *supra* note 20, at 20.

²³ See Klandermans & Visser, *supra* note 3, at 46.

²⁴ See *id.* at 48.

relationship between unions and work councils, and finally will describe the role of unions in social and economic policy on a national level.

B. Freedom of Association

In the Netherlands, it is relatively easy to start a union. The freedom of association is grounded in Article 8 of the Constitution.²⁵ Workers who want to found a union have only to comply with the rules of the law on associations, as elaborated in Book 2 of the Civil Code (*Burgerlijk Wetboek*).²⁶ To give the union official status pursuant to that code, which is necessary for most of union activities, the founders have to go to a notary and make official bylaws.²⁷ However, the several acts on collective bargaining²⁸ set forth extra prerequisites that must be met before a union can be formally recognized as a union within the scope of these acts. In general, the union is obliged to have as an official goal of its bylaws the promotion of workers' interests.²⁹ In addition, a union's bylaws must mention that the union has the capacity to conclude collective labor agreements; otherwise, the union will not be able to conclude such agreements.³⁰ The same is required for employer associations to be able to conclude industry-wide labor agreements.³¹ Employees who belong to unions and employers that belong to employers' associations are called "organized" employees and employers.

²⁵ See GRONDWET [Constitution of the Kingdom] [GRW. NED.], art. 8.

²⁶ *BURGERLIJK WETBOEK* [BW] bk. 2, tit. 2.

²⁷ See BW para 2:27; Wet CAO, para. 2 [hereinafter Wet CAO].

²⁸ See Wet op de Collectieve Arbeidsovereenkomst (1927); Wet op het Algemeen Verbindend en Onverbindend Verklaren van bepalingen van Collectieve Overeenkomsten (1937); SER-Besluit Fusiegedragsregels (1975) [hereinafter SER Fusiegedragsregels]; Wet op de Ondernemingsraden (1971) [hereinafter WOR]; Wet Melding Collectief Ontslag [Act on Notifying Collective Dismissal] (1976), laatstelijk gewijzigd bij (*published in adapted form*) juli 1993 Stb. 386 [hereinafter Wet Melding Collectief Ontslag]; Wet op de Bedrijfsorganisatie (1950); SER-Besluit Richtlijnen Representativiteit Organisaties (1977).

²⁹ See Klandermans & Visser, *supra* note 3; Wet Melding Collectief Ontslag, *supra* note 28, para. 3-4; SER Fusiegedrageregels, *supra* note 28, para. 14.

³⁰ See Wet CAO, *supra* note 27, para. 2.

³¹ See *id.*

C. Unions in Collective Bargaining

Collective bargaining is done either industry-wide or at individual companies, but not simultaneously at both levels for any single firm. The Act on Collective Labor Agreements (Wet op de Collectieve Arbeidsovereenkomst 1927, or Wet Cao)³² defines a collective labor agreement as a contract which mainly contains terms concerning labor and employment, like wage terms and working hours.³³ The parties to a collective labor agreement are an employer or employer's association on one side and a union on the other. As mentioned above, the bylaws of both the employers' organization and the union must include the capacity to conclude collective labor agreements. However, the union does *not* have to be chosen by the employees as their representative. In fact, the employer is legally free to bargain (or not to bargain) with any and every union that the employer likes.³⁴ Despite the lack of a legal obligation to bargain collectively, almost 70% of the labor force is covered by collective agreements.³⁵

1. Industry-Wide Agreements

Notwithstanding the decline of industry-wide collective bargaining, industry-wide collective labor agreements still cover most of the workforce.³⁶ Members of an employers' association

³² See generally *id.*

³³ See *id.* para. 1. Currently, the Act also covers collective labor agreements that only concern funds for early retirement and other comparable arrangements. Previously, people had questioned whether those funds were covered by the scope of the Act. However, the Supreme Court decided such agreements were indeed covered. For a discussion of the case law in this field, see R. Duk, *De Hoge Raad en de fondsenbepalingen* [The Supreme Court and the Funds], SMA, Mar. 1988, at 198-205.

³⁴ See M. Brink, *Een 'recht' op collectief onderhandelen?* [A right to collective bargaining?], SMA, Mar. 1988, at 185, 185-97; L.M. van der Sluis, *Toelating tot CAO onderhandelings* [Admission to Collective Bargaining], 5 ARBEIDSRECHT 12-15 (1995); W.J.P.M. Fase, *Het cao-recht en onderhandelende partijen, vrijheid of gebondenheid?* [Law on Collective Agreement and Negotiating Parties, Freedom or Bondage?], SCHETSEN VOOR BAKELS [CONTRIBUTIONS FOR BAKELS] 47 (1987) [hereinafter Fase 1987]; see also Rb 's-Gravenhage 19 mei 1992, NJ 342/1993 (holding that there is no legal obligation of an employer to bargain with unions); Bleckman BV/Vervoersbond, Rb Almelo 30 augustus 1991, NJ 240/1993 (explaining that a union can start collective action against an employers' organization that does not want to bargain).

³⁵ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 184.

³⁶ See A.G. Nagelkerke, *Institutioneel Balanceren, Decentralisatie in de Nederlandse arbeidsverhoudingen in de jaren tachtig* [Decentralisation in Dutch Labor

that concludes a labor agreement must apply that agreement to all of its employees, whether or not the employees are members of the union with which the agreement was concluded.³⁷ Hence, the union, in fact, represents all employees working for companies that belong to the association concluding the industry-wide agreement.

There is a trend toward industry-wide collective labor agreements developing into minimum agreements.³⁸ In other words, the collective agreement acts as a floor to labor conditions, and companies are free to offer better conditions to their employees beyond what is required by the collective agreement. However, employers are *not* permitted to offer labor conditions that are *less* than the minimums expressed in the collective agreement.³⁹ Therefore, collective labor agreements are, in effect, taking over the role of employment law. These laws typically set minimum employment standards, such as minimum wages.⁴⁰ Further, the minimum terms of collective agreements are generally at a higher level than those required by law.⁴¹ But, most of the minimum terms in collective agreements continue to contain clauses on less important subjects, like schooling possibilities. For instance, wages for the industry as a whole are still solely determined by the collective labor agreement.

Today, labor-related problems are often said to be solved more effectively through collective bargaining than through state intervention.⁴² Furthermore, those parts of the labor market covered by collective bargaining agreements generally offer better labor conditions than those that are not covered, and are dependent on the law to set minimum standards.⁴³

Relations in the Eighties], SMA, Jan. 1994, at 22-23.

³⁷ See Wet CAO, *supra* note 27, para. 14.

³⁸ See Nagelkerke, *supra* note 36, at 20-30.

³⁹ See 39 W.J.P.M. FASE, C.A.O.-RECHT [LAW OF COLLECTIVE AGREEMENT] (1982) [hereinafter FASE 1982]; BAKELS, *supra* note 17, at 171.

⁴⁰ See BAKELS, *supra* note 17, at 199, 203.

⁴¹ See *id.* at 179.

⁴² See *id.* at 195-96, 202-05; JACOBS & HEERMA VAN VOSS, *supra* note 3, at 179.

⁴³ See BAKELS, *supra* note 17, at 179.

2. *Single-Employer Agreements*

The number of collective agreements concluded between a labor union and an individual employer is rising.⁴⁴ The employer has to apply the agreement to all its employees.⁴⁵ Employees do not have a choice as to whether they will be represented by the union.⁴⁶ Here, as with industry-wide agreements, the union, in fact, represents all employees working for the employer.

3. *General Applicability*

Pursuant to the Act on the Declaration of General Applicability of Provisions of Collective Agreements,⁴⁷ the Minister of Employment can declare industry-wide collective labor agreements to be generally binding for an entire industry.⁴⁸ The effect of this declaration is that all employers in the industry, whether they are organized or not, must apply the agreement to their employees.⁴⁹ The sanction for deviating from the agreement is to render any deviation null and void, and the original agreement is applied instead of the deviation.⁵⁰

To determine whether an agreement should be generally applicable, the Minister calculates the number of employees who are already working under the collective terms. If this number represents a majority of the industry, the agreement can be declared binding for the whole industry.⁵¹ Thus, the amount of employees working for organized employers determines whether the agreement is declared binding for all employers.⁵² Consequently, unions in effect represent all workers in an industry

⁴⁴ See Nagelkerke, *supra* note 36, at 22.

⁴⁵ See Wet CAO, *supra* note 27, para. 14.

⁴⁶ See *supra* note 37 and accompanying text.

⁴⁷ Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten (1937) [hereinafter Wet AVV].

⁴⁸ See *id.* para. 2-1. One of the parties to the collective agreement has to ask the Minister of Employment to make the agreement binding for all. See *id.* para. 4-1.

⁴⁹ See *id.* para. 3-1.

⁵⁰ See *id.* para. 3-1.

⁵¹ See FASE 1982, *supra* note 39, at 101-2; CARLA SCHUTTE, OVERZICHT VAN HET CAO-RECHT [OVERVIEW OF THE LAW OF COLLECTIVE AGREEMENT] 66-7 (1995); JACOBS & HEERMA VAN VOSS, *supra* note 3, at 188.

⁵² See FASE 1982, *supra* note 39, at 101-2; SCHUTTE, *supra* note 51, at 66-7.

when bargaining about labor agreements.

D. The Influence and Effect of Unions

Neo-classical economic theory expects that the involvement of unions leads to higher wages.⁵³ However, research shows that, in the Netherlands, union involvement leads to a rather moderate development of the wage level.⁵⁴ A statistical analysis of wages in companies and sectors where unions are involved in collective bargaining concludes that, in those companies and sectors, wages are lower than in companies and sectors where unions are *not* involved.⁵⁵ It seems that unions in the Netherlands are so deeply involved in the interests of the welfare state in general that outrageous wage demands (from the employers' point of view) are not made.⁵⁶ The idea that unemployment can be beaten through a moderate development of the wage level has been paramount in Dutch labor relations, particularly since the 1970s.⁵⁷

Dutch unions, through the operation of the two acts on collective bargaining,⁵⁸ represent a fairly large part of the Dutch labor force.⁵⁹ However, only 25% of the labor force belongs to a union. Hence, the majority of Dutch employees are represented by a union they did not actively choose. The only possibility for employees to counter this forced representation is to found a new union that can be admitted to the bargaining table.⁶⁰

Case law shows that, where other parties do not want to

⁵³ See Henry S. Farber, *The Analysis of Union Behavior*, in 2 HANDBOOK OF LABOR ECONOMICS, 1039-1089 (Orley Ashenfelter & Richard Layards eds., 1986); Richard B. Freeman, *Unions, Pensions and Union Pension Funds*, in PENSIONS, LABOR, AND INDIVIDUAL CHOICE, 89-118 (David A. Wise ed., 1985); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 252 (1987).

⁵⁴ See M.H.C. Lever & W.A. Marquering, *Effect avv op werkgelegenheid blijkt beperkt* [Effect of the "General Applicability" on Employment is Limited], ECONOMISCH STATISTISCHE BERICHTEN, May 24, 1995, at 484-88.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See JOOP M. ROEBROEK, THE IMPRISONED STATE: THE PARADOXICAL RELATIONSHIP BETWEEN STATE AND SOCIETY 185 (1993).

⁵⁸ See Wet CAO, *supra* note 27; Wet AVV, *supra* note 47.

⁵⁹ See BAKELS, *supra* note 17, at 180-81.

⁶⁰ See Brink, *supra* note 34, at 185-97; van der Sluis, *supra* note 34, at 12-15; Fase 1987, *supra* note 34, at 47.

bargain with a new union, judges weigh the interests of the new union against those of the other parties.⁶¹ Moreover, before a court will grant a new union admission to the bargaining table where the other parties contest its admission, the court must determine how many and what kind of employees the new union represents.⁶² The more unorganized the new union's members have been historically, and the larger their numbers, the greater the chance that the judge will admit the new union to the bargaining table.⁶³ In this way, freedom of collective bargaining is limited by what is called the "justified interests" of the members of the new union. In other words, the judge determines the interests of the employees who are represented by the new union, and whether those interests are reasonable and justified when balanced against the interests of the other parties already admitted to the bargaining table. The case law in this field, however, is rather casuistical. There are no hard and fast rules, and the case law is greatly varied.

E. Right of Notification

In certain circumstances, unions have a right to be notified

⁶¹ See *Andel/GMD*, Rb, Amsterdam, 30 oktober 1980, NJ 179/1982 (ann. MGR) (explaining that a union of doctors should be admitted at the bargaining table because 90% of the doctors working in the sector were members of the union, and that percentage represented 25% of the total number of employees in the sector); *Andel/GMD*, Rb, Amsterdam, 20 januari 1982, NJ 101/1984 (explaining that the same union of doctors should be admitted, because this union represents 25% of all employees in the sector and has as one of its goals—according to its bylaws—the conclusion of collective agreements); *Dienstenbonden FNV, CNV/Werkgeversvereniging Bankbedrijf*, Rb, Amsterdam, 25 maart 1986, KG 184/1986 (stating that the employers' organization and two smaller unions in the banking sector can conclude a collective agreement without the participation of the two largest unions in the sector); *NCHP/Werkgeversvereniging Gezondheidszorg*, Rb, Utrecht, 31 december 1986 en 4 november 1987, NJ 676/1988 (finding carelessness in the behavior of an employers' organization that refused to negotiate with a union which seemed to represent a fair number of employees in the sector); *Bond Personeel/Rundvee Syndicat*, Rb, 's-Gravenhage, 5 september 1989 KG 239/1993 (weighing the interests of one union against those of the employers' organization and the other union); *Haven Vakvereniging/Sleepdienstondernemers*, Rb, Rotterdam, 23 mei 1993, KG 239/1993 (holding that a union that is considered representative and that has the same goals in the collective bargaining process as the other unions in the harbor should be admitted to the bargaining table as it will not damage the negotiations).

⁶² See *Werknemersvereniging RCC/RCC NV*, Rb, Zutphen, 9 mei 1994, PRG 4130/1994 (explaining that as a new union is clearly representative if it has to be admitted to the bargaining table).

⁶³ See *id.*; see also *Andel/GMD*, Rb, Amsterdam, 30 oktober 1980, NJ 179/1982 (ann. MGR); *Andel/GMD*, Rb, Amsterdam, 20 januari 1982, NJ 101/1984.

regarding future major changes in a company.⁶⁴ The two most important changes are mergers and widespread layoffs.⁶⁵ To receive notification on such changes, a union must have been an official union (that is, possessing a legal identity acquired by registering its bylaws at a notary's office) for two years and should be operating in the same industry as the company.⁶⁶ Moreover, the union should have members in the company in question.⁶⁷

1. Mergers

In the case of mergers, the Merger Behavioral Rules (SER *Fusiegedragsregels* 1975)⁶⁸ of the Social and Economic Council apply. These merger rules have no official legal status but are applied by unions and employers' associations and include informal sanctions. According to the merger rules, unions have to be notified about plans for mergers in advance.⁶⁹ A union must keep information regarding future mergers confidential during a certain period of critical time.⁷⁰ However, a union can use this information to negotiate with the employers involved on the employment consequences of the future merger.⁷¹

2. Widespread Layoffs

The Act on Reporting Collective Dismissal (Wet Melding Collectief Ontslag 1976)⁷² requires employers who want to lay off more than 20 workers simultaneously to notify the unions involved.⁷³ The notification is meant to give unions the

⁶⁴ See SER *Fusiegedragsregels*, *supra* note 28, para. 17-21, Wet Melding Collectief Ontslag, *supra* note 28, paras. 3-1, 4-3.

⁶⁵ See SER *Fusiegedragsregels*, *supra* note 28, para. 15; Wet Melding Collectief Ontslag, *supra* note 28, para. 3-1.

⁶⁶ See SER *Fusiegedragsregels*, *supra* note 28, para. 14; Wet Melding Collectief Ontslag, *supra* note 28, para. 3-4.

⁶⁷ See SER *Fusiegedragsregels*, *supra* note 28, para. 14-1; Wet Melding Collectief Ontslag, *supra* note 28, para. 3-4.

⁶⁸ See SER-Besluit *Fusiegedragsregels*, laatstelijk gewijzigd bij Besluit van de SER van 21 december 1990, in werking getreden 15 januari 1991.

⁶⁹ See SER *Fusiegedragsregels*, *supra* note 28, paras. 17, 18-1.

⁷⁰ See *id.* paras. 18-2, 19.

⁷¹ See *id.* para. 18-4.

⁷² See Wet Melding Collectief Ontslag, *supra* note 28.

⁷³ See Wet Melding Collectief Ontslag, *supra* note 28, para. 3-1.

opportunity to start collective bargaining on extra benefits for the employees to be laid off, or to look for other solutions.⁷⁴

3. *The Goals of Notification*

In these cases, the goal of the notification is to allow unions to start bargaining on behalf of the affected workers in the company.⁷⁵ Here again, the union represents all employees involved in the merger or the dismissal, whether or not they are union members.⁷⁶ Founding a new union will be of no use to employees once a merger or collective dismissal is pending, because in order to have a right to notification, the union must have had legal identity for two years.⁷⁷ Here, workers are involuntarily represented by a pre-existing union and are unable to avoid this result, even by forming a new union that could specifically represent their interests.

F. *Unions and Work Councils*

In the Netherlands, worker representation is a dual-channel system. In other words, workers can be represented both by work councils and by unions,⁷⁸ and both groups play a role in the system.⁷⁹

The work councils are based on the Act on Work Councils (Wet op de Collectieve Arbeidsovereenkomst 1927 or Wet Cao).⁸⁰ Depending on the size of the company, the employer must install work councils, which have certain rights to information from the

⁷⁴ See Wet Melding Collectief Ontslag, *supra* note 28, para. 3-3.

⁷⁵ See BAKELS, *supra* note 17, at 192.

⁷⁶ See *id.* at 190.

⁷⁷ See Wet Melding Collectief Ontslag, *supra* note 28, para. 3-4; SER Fusiegedragsregels, *supra* note 28, para. 14-1.

⁷⁸ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 219.

⁷⁹ Sometimes this gives rise to conflict between a union and a work council. See, e.g., Rb, 's-Gravenhage, 19 mei 1992, NJ 1993, 342 (holding that a work council can conclude an agreement with an employer on labor standards in the company, even if there is a union that is willing to bargain with the employer on behalf of the employees). In this case, the union went to court to ask for collective bargaining, but was refused because the work council was legally able to conclude an agreement on labor standards as well (despite the fact that work councils never conclude "real" collective labor agreements, as meant in paragraph 1 of Wet Cao). See *id.*; see also *infra* footnotes 80-85 and accompanying text for a description of the functioning of work councils.

⁸⁰ See WOR, *supra* note 28.

company, as well as the responsibility to advise the employer regarding decisions and the right to give assent to certain decisions.⁸¹ The right of these councils to advise the employer is limited to economic subjects like investments,⁸² the right to assent is limited to social subjects, like holidays or working hours.⁸³ However, if social subjects are detailed in a collective labor agreement, a council's right to assent is preempted by the collective agreement.⁸⁴ If the employer does not comply with the demands of the Act, the council can seek relief from a court.⁸⁵

If the council does not assent to a project proposed by the employer, the company can seek assent ordered by a judge.⁸⁶ When assent to a company's plans is refused by the council, the company has to postpone the decision's implementation for a month, to give the council the chance to seek an injunction in court.⁸⁷ Before going to court, mediation by the industry commission is mandatory.⁸⁸ An industry commission is established by the Social and Economic Council.⁸⁹ These commissions consist of at least six people representing employers' organizations and at least six people representing trade unions. Each industry commission works for a group of companies operating in the same sector. For instance, there is one industry commission for the steel industry. There are currently 70 industry commissions in operation. As mentioned above, these commissions try to mediate the conflicts between the employer

⁸¹ Pursuant to Wet op de Ondernemingsraden (WOR), paragraph 2, a council has to be installed if at least 100 persons are working at the company, or if at least thirty-five persons work more than one-third of the normal time of duty. Depending on the number of working people, the number of members of the council varies. See WOR, *supra* note 28, para. 6. The council can give advice. See *id.* para. 25. The Council also has a right to assent. See *id.* para. 27.

⁸² See *id.* para. 25-1-h.

⁸³ See *id.* para. 27-1-c.

⁸⁴ See *id.* para. 27-3.

⁸⁵ See *id.* paras. 26-1, 27-5, 27-6.

⁸⁶ See *id.* paras. 27-4, 36.

⁸⁷ See *id.* para. 25-6.

⁸⁸ See *id.* para. 36-3.

⁸⁹ See *infra* notes 100-105 and accompanying text for a description of the Social and Economic Council.

and the work councils. This mediation is mandatory.⁹⁰

The council can thus become rather influential in a company. But the unions have the possibility of influencing the work councils through their members. Active union members can become council members; additionally, unions have a right to propose candidates for the council.⁹¹ The members of the council are then selected through an election among the employees of the company.⁹² To be able to nominate candidates, the union should have a legal identity and must have members who have been employees of the company for more than six months.⁹³

Finally, the Act guarantees both work councils and unions a right to demand an investigation by the Corporate Chamber of the Amsterdam Court on the social or economic policy of the company.⁹⁴ However, a union can only make such a request if it operates in the company's industry.⁹⁵

G. Social and Economic Policy

Social and economic policy in the Netherlands is largely decided upon by or with the assent of the so-called "societal midfield."⁹⁶ The midfield consists of the "social partners":⁹⁷ churches, associations of various kinds, boards of schools, hospitals and communal libraries, and industry insurance boards.⁹⁸ All the institutions mentioned have a realm of their own where they reign. This decentralized approach of governance is traditional in the Netherlands.⁹⁹ Coordination of governance

⁹⁰ See BAKELS, *supra* note 17, at 241.

⁹¹ See WOR, *supra* note 28, paras. 9-1, 9-2a.

⁹² See *id.* para. 6-1.

⁹³ See *id.* paras. 6-2, 9-2a.

⁹⁴ See *id.* para. 36.

⁹⁵ See *id.* para. 36a.

⁹⁶ See generally ROEBROEK, *supra* note 57 (especially chapters 4 and 7).

⁹⁷ On a national level, social partners include trade unions and employers' organizations; on a company level, social partners include employers and trade unions or other representatives of employees.

⁹⁸ See generally A. LIPHART, *THE POLITICS OF ACCOMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1975).

⁹⁹ The idea behind the decentralized system is that one should organize and govern a country on the lowest possible level. This system is religiously inspired and is called "sovereignty in the own circle" in Protestant circles or "subsidiarity" in Roman-Catholic

happens at a national level through advisory boards to the government, national associations of churches, and schools. On the national social-economic level, the social midfield is dominated by the Social and Economic Council and the Foundation of Labor.

Founded in 1950, the Social and Economic Council is an official advisory board of the government and consists of representatives from the central associations of unions and employers' organizations and Crown Members, who are appointed by the Queen.¹⁰⁰ The Social and Economic Council advises the government in a very broad sense on all matters regarding social and economic policy, on policy papers, and on draft acts.¹⁰¹ Furthermore, the Council installs industry commissions¹⁰² and, under the supervision of the Council, the various sectors of Dutch industry and agriculture are organized.¹⁰³ The Council was to be the crown jewel of the corporatist midfield, but was not successful in all fields.¹⁰⁴ The Council was once one of the most powerful semi-governmental bodies in the country, but its power is now declining in favor of the Foundation of Labor.¹⁰⁵

The Foundation of Labor is a private initiative of the social

circles. In other words—as explained by the leader of the Protestant party, Abraham Kuyper—"sovereignty in the own circle" means "that state as well as society each obtain their own domain, their own sovereignty, and that the social question can not be properly solved, unless that duality is respected." ROEBROEK, *supra* note 57, at 40-7.

This system of government was developed to enable the two main religions—Protestantism and Roman Catholicism—to have as much autonomy as possible. Basically, this decentralized system prevented the Protestants, who were the most influential, to reign over the also rather powerful Roman Catholics. The Social Democrats also profited from this system to develop their own sovereignty. Hence, the midfield is divided into the "pillars," consisting of groups within the same socio-political and religious denominations. See ROEBROEK, *supra* note 57, at 83-91. In the past, there existed—and to some extent still exists today—Roman Catholic, Protestant and Social Democrat parties, schools, libraries, youth associations, and hospitals. See generally LIJPHART, *supra* note 98, for more information on the development of the Dutch welfare state through this system of "pillars."

¹⁰⁰ See Wet op de Bedrijfsorganisatie (1950) para. 4-2.

¹⁰¹ See Wet op de Bedrijfsorganisatie *supra* note 28, paras. 2 (general description of activities), 32 (authority to set regulations for an industry), 41-45 (advice), 88 (authority to install a commission in certain fields). See also BAKELS, *supra* note 17, at 257-59.

¹⁰² See *supra* notes 89-90 and accompanying text.

¹⁰³ See Wet op de Bedrijfsorganisatie, *supra* note 28, paras. 66, 67.

¹⁰⁴ See BAKELS, *supra* note 17, at 261-62; LIJPHART, *supra* note 98, at 112-15.

¹⁰⁵ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 190-92.

partners, founded in 1945, right after World War II ended.¹⁰⁶ The Foundation advises both government and social partners on social and economic matters, again, in a very broad sense.¹⁰⁷ Since the state is gradually retiring from all sorts of activities in the social and economic field,¹⁰⁸ the Foundation has become more powerful. Its members are appointed by the central organizations of the employers' associations and trade unions, whom the members of the Foundation represent.¹⁰⁹

In both the Council and the Foundation, the central organizations of the unions play a role. The unions bargain with the employers' organizations (in both the Council and the Foundation) and the government (together with the employers' organizations on the Council) on all issues of social and economic policy.¹¹⁰ The power of these institutions is vast.¹¹¹ If there is unity in the Council or the Foundation, parliament usually follows.¹¹² This is partly because the state has declared deregulation as the goal of every policy,¹¹³ but it is also a consequence of the power exercised by both the Council and the Foundation.

H. Formal Power and Declining Membership

As described above, unions have a large degree of formal

¹⁰⁶ See BAKELS, *supra* note 17, at 161; JACOBS & HEERMA VAN VOSS, *supra* note 3, at 190.

¹⁰⁷ See BAKELS, *supra* note 17, at 161, 203-04.

¹⁰⁸ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 190-92; BAKELS, *supra* note 17, at 198-99, 204-05. See SOCIAL AND ECONOMIC COUNCIL, VERDELING VAN VERANTWOORDELIJKHEDEN TEN AANZIEN VAN DE INKOMENS BESCHERMING BIJ ZIEKTE, ARBEIDSONGESCHIKTHEID, WERKLOOSHEID, OUDERDOM EN OVERLIDEN [REPORT ON DIVISION OF RESPONSIBILITIES IN THE FIELD OF THE PROTECTION OF INCOME AT ILLNESS, DISABILITY, UNEMPLOYMENT, OLD AGE AND DEATH] (1994) for an overview.

¹⁰⁹ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 190; BAKELS, *supra* note 17, at 161.

¹¹⁰ See, e.g., THE HAGUE, DE SOCIAAL ECONOMISCHE RAAD. PROBLEMEN EN TOEKOMST [THE SOCIAL AND ECONOMIC COUNCIL. PROBLEMS AND FUTURE] (A. Peper ed., VUGA 1981); THE HAGUE, TIEN JAAR STICHTING VAN DEN ARBEID [TEN YEARS FOUNDATION OF LABOR]; BAKELS, *supra* note 17, at 161, 256-59.

¹¹¹ It is commonly said when the Foundation agrees on some major point concerning labor or employee law, that it has decided upon adding an article number "x" to the Civil Code. Nobody seems to realize that it is parliament that must add the article.

¹¹² See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 190-91; BAKELS, *supra* note 17, at 161.

¹¹³ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 21.

power in shaping Dutch industrial relations and in collective bargaining. However, the decline of the membership rates is seen as a serious problem.¹¹⁴ If the unions represent only a quarter of the workforce, and if this rate is still declining and is even lower in newer sections of the labor market than it is in the market for services, what is the explanation of this formal power of the unions?

III. The Changing Labor Force

A. A Heterogeneous Labor Force

The Dutch labor force traditionally consisted of white male breadwinners.¹¹⁵ At the beginning of this century, those involved in the "social matter"¹¹⁶ were worried about the loose morality of the lower classes and found the solution in the housewife and mother.¹¹⁷ She was supposed to be chaste and demure, to make sure her husband and children would be properly fed, and to raise intelligent and able future workers.¹¹⁸ If these women found it financially necessary to work, they were to be protected from the harshest forms of work.¹¹⁹ Thus, night shifts and certain jobs were forbidden for women.¹²⁰ The opponents of this movement claimed the importance of paid work for women and of equal opportunities

¹¹⁴ See Klandermans & Visser, *supra* note 3, at 48-49; BAKELS, *supra* note 17, at 159.

¹¹⁵ See JANNEKE PLANTENGA, EEN AFWIJKEND PATROON. HONDERD JAAR VROUWENARBEID IN NEDERLAND EN (WEST-)DUITSLAND [A DIFFERENT PATTERN. A HUNDRED YEARS OF WOMEN'S LABOR IN THE NETHERLANDS AND WEST GERMANY] 51-7 (1993).

¹¹⁶ At the beginning of this century, the circumstances in which the lower classes lived worried the bourgeoisie. They referred to these circumstances (dangerous labor conditions, bad housing, and no health facilities) as the "social matter."

¹¹⁷ See generally ELISABETH BADINTER, L'AMOUR EN PLUS (1980) (especially chapters 2 and 3). For a discussion on this situation for the Netherlands specifically, see MARIANNE BRAUN, DE PRIJS VAN DE LIEFDE. DE EERSTE FEMINISTISCHE GOLF, HET HUWELIJSRECHT EN DE VADERLANDSE GESCHIEDENIS [THE PRICE OF LOVE. THE FIRST FEMINIST WAVE, THE LAW OF MARRIAGE AND THE HISTORY OF THE NETHERLANDS] (1992), particularly chapters 4 and 5.

¹¹⁸ See Margriet Kraamwinkel, *Womens's Work and Law: New Perspectives on the Labor Market Strategy*, 26:3 NEW ENG. L. REV. 824 (1992).

¹¹⁹ See *id.* at 825.

¹²⁰ See *id.*

for men and women.¹²¹ They lost, however. The financial crisis of the thirties, with its accompanying mass unemployment, led to an even more negative attitude towards working women, who were considered to be stealing jobs from men by accepting lower wages.¹²² Instead of gaining equal pay, women were further banned from the labor market.¹²³ Unlike American women, who benefited from the war industry during World War II, Dutch women had no opportunity to seize vacated jobs, because the Netherlands was an occupied country during that period.¹²⁴

Thus, the Dutch welfare state, in its characteristic form, evolved after World War II on the model of the nuclear family, in which the man worked and earned the family income.¹²⁵ He received entitlements to social security and welfare benefits which allowed him to sustain his family.¹²⁶ His wife was at home, being a good housewife and mother, waiting for the children with tea and cookies when they came home from school.¹²⁷

The success of the welfare state and the stratification of Dutch society into sociopolitical denominations made the whole country essentially poor, middle class.¹²⁸ The Dutch welfare state was based on capitalist modes of production, the consequences of which were alleviated by the government through a well-developed system of social security.¹²⁹ At the same time, the government had a lot of influence on the development of wages.¹³⁰ In fact, the government more or less determined wages until 1970. Therefore, wages did not rise to very high levels, although there

¹²¹ See *id.* at 836-37.

¹²² See *id.* at 832.

¹²³ See *id.* at 833-34.

¹²⁴ See Jet Bussemaker, *Welvaart, welzijn en sekse. Grondslagen van de verzorgingsstaat* [Welfare, Wellbeing and Sex: Foundations of the Welfare State], in 50:2 TIJDSCHRIFT VOOR VROUWENSTUDIES 219-20 (1992).

¹²⁵ See *id.* at 221.

¹²⁶ See *id.* at 222-23.

¹²⁷ See Kraamwinkel, *supra* note 118, at 825.

¹²⁸ Lijphart even claims that "Holland has been a bourgeois nation for centuries." LIJPHART, *supra* note 98, at 97-98.

¹²⁹ See ROEBROEK, *supra* note 57, at 159-218.

¹³⁰ See W.J.P.M. FASE, *VIJFENDERTIG JAAR LOONBELEID IN NEDERLAND. TERUGBLIK EN PERSPECTIEF* [THIRTY FIVE YEARS OF WAGE POLICIES IN THE NETHERLANDS. RETROSPECT AND PERSPECTIVE] 41-57 (1980) [hereinafter FASE 1980].

were conflicts about the wage level.¹³¹ This is why I call the Dutch middle class "poor."

The stratification of society in sociopolitical denominations peaked in the 1950s.¹³² The decentralized approach of government¹³³ led to separate spheres in which Roman Catholic, Protestant, and Social Democrat citizens lived. For instance, a Protestant worker was more likely to talk to a Protestant employer, than to a Roman Catholic worker. Moreover, the Protestant worker went to a Protestant church, had his children attend a Protestant school, voted for a Protestant party, married a Protestant wife, and rented a house from a Protestant housing corporation.¹³⁴

Because the Dutch welfare state was modeled on the nuclear family, the labor force consisted almost solely of white, middle-class males.¹³⁵ The first changes came during the 1960s. During that decade, the shortage of labor did not lead to inviting women into the paid labor market, but to inviting first Italian, Spanish, Portuguese and, later, Turkish and Moroccan workers, the so-called "guest workers."¹³⁶ They were called "guest workers" because they were supposed to return to their home countries when they retired from their unskilled factory jobs.¹³⁷ Instead, these workers brought their families to join them, and settled in the Netherlands.¹³⁸

¹³¹ See *id.* at 63-70.

¹³² See PLANTENGA, *supra* note 115, at 20-21, 27-28.

¹³³ See *supra* notes 96-99 and accompanying text for this Article's treatment of the decentralization of Dutch government.

¹³⁴ See ROEBROEK, *supra* note 57, at 83-91.

¹³⁵ See Kraamwinkel, *supra* note 118, at 832.

¹³⁶ For an overview of the adventures of Italian guestworkers, see FRANK BOVENKERK ET AL., *ITALIAANS IJS, DE OPMERKELIJKE HISTORIE VAN DE ITALIAANSE IJSBEREIDERS IN NEDERLAND* [ITALIAN ICECREAM, THE REMARKABLE HISTORY OF THE ITALIAN ICE-MAKERS IN THE NETHERLANDS] (1983) [hereinafter BOVENKERK]. For a depiction of the experiences of Spanish guest workers in a large steel plant, see Hans Smits, *De Spanjaarden kunnen gaan* [*The Spanish Can Leave*], *VRJ NEDERLAND*, Nov. 1996, at 34-41.

¹³⁷ See HAN B. ENTZINGER, *HET MINDERHEDENBELEID: DILEMMA'S VOOR DE OVERHEID IN NEDERLAND EN ZES ANDERE IMMIGRATIELANDEN IN EUROPA* [MINORITY POLICY: DILEMMA FOR THE DUTCH GOVERNMENT AND SIX OTHER IMMIGRATION COUNTRIES IN EUROPE] (1984).

¹³⁸ See BOVENKERK, *supra* note 136, at 123-59; ENTZINGER, *supra* note 137, at 100-05.

In the 1970s, women started looking for jobs.¹³⁹ They were better educated than their predecessors, and most formal barriers—like the obligation to fire a female civil servant upon marriage—had disappeared.¹⁴⁰ “Classless” Holland developed a lower class comprised of people of color and a large section of “folding chair workers,”¹⁴¹ typically middle class, white women who wanted to do something other than make tea and bake cookies.¹⁴² The labor force thus became more heterogeneous with the influx of immigrants and women. Nevertheless, even today, unemployment remains relatively high among the former immigrants and among women.¹⁴³

B. A Heterogeneous Demand for Labor

The male breadwinners of the working middle class had full-time, life-long jobs with salaries high enough to raise families.¹⁴⁴ The wages were family wages, and the housewife made full-time jobs possible for their husbands by attending to the home.¹⁴⁵ The lifetime commitment to a job or company was rewarded by automatic career paths and a somewhat steep wage path, thus allowing people to start low on the skill and wage level and gradually get the better jobs and incomes. If workers stayed long enough in their jobs, they would eventually become heads of sections or foremen.¹⁴⁶

But today, the welfare state is in decline, and the modes of production are changing.¹⁴⁷ In addition, traditional industry is in decline and the market for services is growing.¹⁴⁸ The changes in

¹³⁹ See KLANDERMANS & VISSER, *supra* note 3, at 12.

¹⁴⁰ See Kraamwinkel, *supra* note 118, at 825.

¹⁴¹ Folding chair workers are flexible workers who do not have labor contracts but are called by their employers whenever they are needed and are paid on an hourly basis. Generally, these workers are not entitled to social security benefits.

¹⁴² See DE BEER, *supra* note 6, at 65-106, for a demographic description of the “new worker.”

¹⁴³ See *id.* at 96-98.

¹⁴⁴ See Bussemaker, *supra* note 124, at 221.

¹⁴⁵ See *id.*

¹⁴⁶ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 59.

¹⁴⁷ See *id.* at 6.

¹⁴⁸ See *id.*

the post-Fordist, post-industrial modes of production and the consequences for the labor markets have been described extensively elsewhere.¹⁴⁹ In summary, flexibility and flexible accumulation seems the code-word of production in the 1990s.¹⁵⁰ Flexible accumulation, according to Harvey, is characterized by the increasing flexibility of labor processes, labor markets, products and consumers' wishes, the development of new sectors in industry, and technological and organizational changes. In the labor market, these developments lead to structural unemployment, a growing need on the employer's side for workers who can learn new skills quickly, a more moderate wage development, and less influence for unions.¹⁵¹ The changes in modes of production induce employers to develop a reserve army of flexible labor.¹⁵² Companies work with a small core group of employees with specific skills and tasks.¹⁵³ This group of employees generally has good labor and wage conditions and still consists of white, middle-class, educated men.¹⁵⁴

In addition to the core groups, two other groups of employees are developing, but in a less favorable position.¹⁵⁵ For those groups, the employment relationship has a more transitory and mobile character and can be described as a contingent employment relationship.¹⁵⁶ The first group of employees performs relatively low-skilled tasks, like typing.¹⁵⁷ The second group is a far more flexible group on temporary contracts with low labor and wage conditions.¹⁵⁸ These developments, combined with the decline of the welfare state, have lead to a growing pressure on both partners of a household to look for jobs, which coincides with the wishes of

¹⁴⁹ See, e.g., DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989).

¹⁵⁰ See *id.* at 147.

¹⁵¹ See *id.* at 149-50.

¹⁵² See *id.* at 151-52.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See Karl E. Klare, *Toward New Strategies for Low-wage Workers*, 4:2 PUB. INTEREST L. J. 250 (1995).

¹⁵⁷ See HARVEY, *supra* note 149, at 151-52.

¹⁵⁸ See *id.*

employers for a larger potential labor force.¹⁵⁹

C. The New Worker in the Flexible Market

Flexible and temporary contracts, temporary unemployment, job hopping, descending career paths, mass layoffs and the closing of factories are all part and parcel of the Dutch labor market in the 1990s.¹⁶⁰ The current social contract—consisting of the gender contract, in which women assume the bulk of family care and domestic functions, and the employment contract, which defines this division of labor as its norm—is under pressure.¹⁶¹ In this view, the gender contract can be seen as an implicit contract between men and women dividing paid labor and unpaid care tasks. This contract was quite simple, assigning paid labor to men and unpaid care tasks to women. In return for their unpaid care tasks which enabled men to perform their paid labor, women could enjoy the earnings of men. The employment contract is the other side of the coin: It assumes that the male worker has no other duties than his work.¹⁶² This division of labor conflicts with the new reality of men's and women's lives. The Organization for Economic Cooperation and Development (OECD) claims the new worker tends to be someone who finds a place in the flexible labor market; the flexibility of this labor market also offers more opportunities to combine paid labor with unpaid care and household tasks.¹⁶³ In addition, growing unemployment in the Netherlands demands a re-division of paid labor.¹⁶⁴ However, this new worker still is predominantly female, is advanced by requirements of flexible labor, and stimulated by economic reasons.¹⁶⁵ Thus, the central issue here is whether the flexible labor

¹⁵⁹ See *id.*

¹⁶⁰ See generally CBS 95-96, *supra* note 9; *Aantal flexibele banen steeg ook in 1996 fors* [The number of flexible jobs increased also in 1996], DE VOLKSKRANT, Jan. 24, 1997, at 7.

¹⁶¹ See Janneke Plantenga, *A Time for Working, a Time for Living: Structural Changes in the Division of Labour and Care*, in *LABOUR MARKET INEQUALITY BETWEEN MEN AND WOMEN, CURRENT ISSUES IN LAW AND ECONOMICS 95* (Bart Hessel et al. eds., 1996) [hereinafter *A Time for Working*].

¹⁶² See Riki Holtmaat, *Naar een ander recht*, 1 NEMESIS 3-13 (1988).

¹⁶³ See OECD, *WOMEN AND STRUCTURAL CHANGE: NEW PERSPECTIVES 20* (1994).

¹⁶⁴ See *A Time for Working*, *supra* note 161, at 97.

¹⁶⁵ See *id.* at 101.

market can offer the kind of flexibility the new worker wants. In other words, are new workers able to organize enough countervailing power against the employers who are organized in larger contexts, like multinational companies? And, if they are, which way of organizing should be chosen?

IV. Unions in Decline

The decline in membership is viewed by unions as a serious problem.¹⁶⁶ But there are other factors as well that might contribute to a decline in trade union influence. One is the current discussion on the status of the work councils.¹⁶⁷ These councils can and, in fact, do conclude agreements with employers.¹⁶⁸ In these agreements, labor conditions are settled.¹⁶⁹ However, as described above, terms that have been settled extensively in the collective labor contract between a union and an employer cannot be included in the agreement between a council and employer.¹⁷⁰ There is, however, a trend to grant the work councils more rights in this area, as it is generally felt that the councils are more able to negotiate agreements that fit the special context of the company in which they operate.¹⁷¹ In the end, this will possibly lead to a decline in union influence through collective bargaining. Although some labor law scholars also suggest ways to strengthen the position of the union in the work councils, the general feeling seems to be that councils are the future in organizing employees.¹⁷² But unions probably have a continuing role to play in workers' representation.¹⁷³ For instance, Hugh Collins, in a paper presented

¹⁶⁶ See *supra* note 114 and accompanying text.

¹⁶⁷ See G.J.J. Heerma van Voss, *Het doek gaat op voor het arbeidsrecht van de onderneming* [*The Curtain is Drawn for Labor Law in the Firm*], 1 SOCIAAL RECHT 3 (1996); Antoine T.J.M. Jacobs, *Het juridisch tekort in het arbeidsrecht* [*The Legal Shortcomings in Labor Law*], NEDERLANDS JURISTENBLAD, June 14, 1996, Issue 24, at 917-22 (1996); A.M. Luttmer-Kat, *Automatische doorwerking van met de ondernemingsraad overeengekomen (arbeidsvoorwaarden) regelingen* [*Automatic Effect of Agreements with the Work Council*], 1 SOCIAAL RECHT 63 (1996).

¹⁶⁸ See SCHUTTE, *supra* note 51, at 67-68.

¹⁶⁹ See *id.* at 70; BAKELS, *supra* note 17, at 181.

¹⁷⁰ See *supra* note 79 and accompanying text.

¹⁷¹ See Heerma van Voss, *supra* note 167, at 3.

¹⁷² See generally Jacobs, *supra* note 167; Luttmer-Kat, *supra* note 167.

¹⁷³ See Hugh Collins, *Flexibility and Empowerment*, (1996) (unpublished

at the Royal Netherlands Academy of Arts and Sciences, argues that for some problems that workers encounter, organizing through work councils seems more appropriate than organizing through unions, while for other problems, unions might be a better means to address workers' problems.¹⁷⁴

Another problem for unions may be the differentiation in unions. The hegemony of the traditional Social Democratic/Roman Catholic¹⁷⁵ and Protestant blue-collar unions is diminishing. For example, two unions for white-collar employees are becoming more influential.¹⁷⁶ This differentiation has led to the union practice of undercutting one another at the bargaining table. This is best illustrated by the developments in the March 1996 collective bargaining at Philips, the nation's big electronics company, which manufactures everything from television sets to light bulbs.

At Philips, the traditional blue-collar oriented unions had proposed a decrease in working hours—from 40, to 36 per week—in order to offer some (albeit minor) mitigation to the growing unemployment in blue-collar work.¹⁷⁷ Philips did not want to discuss this matter, and the two white-collar unions also involved in the bargaining seemed unconcerned with the matter.¹⁷⁸ As a result, the traditional unions left the bargaining table. Within twenty-four hours, a collective agreement was concluded between Philips and the other unions which—due to the legal obligation of the employer as described above—will be applied to all Philips' employees, even those who belong to the blue-collar unions.¹⁷⁹

The Philips case is a good example of a company's "divide and conquer" tactics. The white-collar unions collectively have 3,000 members among the 44,000 employees at Philips.¹⁸⁰ On the other

manuscript, on file with the author).

¹⁷⁴ See *id.*

¹⁷⁵ The Social Democratic and Roman Catholic unions merged in 1982, to create a single, larger union.

¹⁷⁶ See BAKELS, *supra* note 17, at 163-64.

¹⁷⁷ See *FNV en CNV nemen risico met Philips-overleg* [*FNV and CNV Take a Risk During Collective Bargaining at Philips*], DE VOLKSKRANT, Apr. 10, 1996, at 7.

¹⁷⁸ See *id.*

¹⁷⁹ See *Philips: strijd tussen witte en blauwe boorden* [*Philips: fights between white and blue collars*], NRC/HANDELSBLAD, Apr. 16, 1996, at 15.

¹⁸⁰ See *id.*

hand, the blue-collar unions have 10,000 members among the Philips employees.¹⁸¹ Thus, the smallest and the least representative unions are able to set the terms of the collective labor agreement.

When the employer is unwilling to bargain, even having a large number of members does not help a union in negotiations. A discussion on the ability of one union to conclude a collective agreement for all workers, without approval from the employees, will certainly follow.

These developments might become serious problems for the trade unions. If the unions want to continue their role in Dutch industrial relations, their position should be enhanced. One of the possibilities the unions see is in attracting more members.¹⁸² They are trying to develop new strategies to do this. For instance, all members of the ABVA/KABO, the large civil servant union, received a membership card in December 1995, which gave them discounts on holidays, in restaurants and in shops.¹⁸³ Second, the unions try to present themselves as supportive of general interest groups by paying attention to the unemployed, as they did in the Philips case.¹⁸⁴ They are also paying more attention to specific issues that are considered important for women—for example, parental leave—than they did a few years ago.¹⁸⁵ In short, two lines of newly developing union policy can be distinguished. The first is to broaden the scope of activities of the unions and to extend the advantages for the members, and the second is to pay attention to interests of all possible groups in the labor market.¹⁸⁶ Both can and must lead to increasing union membership, mainly by organizing those who have not previously been involved in

¹⁸¹ *See id.*

¹⁸² *See* Klandermans & Visser, *supra* note 3, at 48-49; BAKELS, *supra* note 17, at 159.

¹⁸³ The ABVA/KABO also organizes university lecturers and professors. As I am a member, I received my membership card in December 1995 with a flyer with discount prices and a list of shops that worked together with the union in offering extras to members.

¹⁸⁴ *See supra* notes 177-181 for this article's treatment of the Philips' case.

¹⁸⁵ *See* BAKELS, *supra* note 17, at 75 (discussing the general trend in labor law concerning these issues).

¹⁸⁶ *See* Klandermans & Visser, *supra* note 3, at 26-28.

unions. For the unions, the answer to the question whether they have to organize the new worker seems relatively easy: It is a wholehearted "yes," with a "the sooner the better" coming right after it.

However, broadening the scope of activities and offering discount prices might turn unions into general associations with only weak links with the labor conditions that once were the reason for their coming into being. Furthermore, due to the process of flexibilization I described above, the labor market is turning into one of the hardest places to survive and a place where the development of countervailing power seems essential.¹⁸⁷ In my view, the development of countervailing power is important for unions. Thus, paying attention to the several different groups in society and their labor conditions might seem a more union-like thing to do. But the new workers essentially consist of groups which have a flexible labor pattern and various alternating jobs of different quality, and thus might be difficult to reach.¹⁸⁸ For example, when the collective bargaining agreement is reached, the new workers might have already moved to a new job that does not fall within the scope of the agreement.

Hence, enhancing union position through attracting more members among the new workers seems important for the unions. The question remains how unions should accomplish this goal. Is turning into general associations for the general well-being the way? Or should more attention be paid to labor conditions of the new workers?

V. The Need for Organizing Workers: Creating Countervailing Power

Unions have grown out of the desire to create countervailing power against employers, who in general have greater economic power than the individual employee.¹⁸⁹ This need to develop

¹⁸⁷ See *supra* notes 150-54 and accompanying text.

¹⁸⁸ See Margriet Kraamwinkel, *Vakbonden en flexibele werknemers* [Unions and Flexible Workers], in *FLEXIBILISERING VAN HET SOCIAAL RECHT* 209-11 (F.J.L. Pennings ed., 1997).

¹⁸⁹ See, e.g., JOHN P. WINDMULLER, *LABOR RELATIONS IN THE NETHERLANDS* 1-40 (Cornell University Press, Ithaca, NY 1969) (including an overview of the rise of the unions in the Netherlands); HENRIËTTE ROLAND HOLST, *KAPITAAL EN ARBEID IN*

countervailing power obviously still exists. For example, Collins argues that there are three reasons for workers to organize themselves: exploitation, disrespect and alienation.¹⁹⁰ In his view, exploitation—defined as “the belief that the employer is offering an unfair wage-work package”—is best addressed through unionization.¹⁹¹ Addressing disrespect—or “the desire to be treated with dignity and respect”—is best done through mechanisms for consultation and procedural rules which restrict managerial discretion.¹⁹² This goal can be reached on a plant- or enterprise-basis through collective bargaining to ensure that the workers’ voices will be heard.¹⁹³ The problem of alienation at work—“the search to construct jobs which can contribute to the meaning of workers’ lives”—involves issues about the nature of work and the composition of jobs which seem best addressed in the production unit, rather than plant- or firm-wide.¹⁹⁴ However, due to the flexibility of their employment relationship, the new workers may find that collective bargaining is not the way to address their problems with exploitation, disrespect and alienation. Rather, such workers may find it necessary to seek a different organization to address these problems.

Apparently, there is room for a greater role for the law than there was previously.¹⁹⁵ For example, the legal strategies Collins proposes are twofold: (1) providing “a legal framework for the purpose of compelling employers to bargain with representative unions in good faith,”¹⁹⁶ and (2) seeking “alternative methods for representation which exploit any new opportunities afforded by the reconfigured relations of production entailed by flexible specialization.”¹⁹⁷ Collins concludes his paper by stating that viewed from this perspective, there might be an important role for

NEDERLAND [CAPITAL AND LABOR IN THE NETHERLANDS] 50-116 (1977).

¹⁹⁰ See Collins, *supra* note 173, at 2.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See *id.* at 2-3.

¹⁹⁴ *Id.* at 3.

¹⁹⁵ See *id.* at 7.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

work councils to play alongside unions in a dual channel system.¹⁹⁸

Because this dual channel of workers' representation already exists in the Netherlands and collective bargaining is supported and regulated by labor law, the Dutch might easily be seduced into claiming that they are far ahead of nations such as the United Kingdom, and can thus retire.¹⁹⁹ However, the Dutch work councils do not seem to be able to develop much countervailing power and are, in many instances, far more conservative than the unions and far more interested in the problems of the tenured employees.²⁰⁰ Furthermore, the collective bargaining at Philips shows that there might be some problems with the way the law supports collective bargaining.²⁰¹ Thus, the new workers do not seem to be helped very much by this dual channel. So the question remains, how should the new worker organize?

First, according to Collins, workers organize themselves to counter exploitation, disrespect and alienation.²⁰² These three factors seem to be paramount characteristics of the life of the new worker. The new worker faces short-term contracts with low wages and without job security, demands for immense flexibility and contingent contracts, and unskilled labor without any hope for career advancement.²⁰³ Due to the flexible nature of the contract, it might be difficult for new workers to organize. For example, the colleague with which you work today could be gone tomorrow, and speaking up against unfair practices could cost you a job.²⁰⁴ Thus, we may conclude that new workers have a strong interest in

¹⁹⁸ See *id.* at 11.

¹⁹⁹ Worker representation in the UK is generally based on trade unions. For an overview of worker representation in the UK, see Siegfried Mielke et al., *Trade Union Organisation and Employee Representation*, in *TRADE UNIONS IN THE EUROPEAN UNION* 129, 172-88 (Wolfgang Lecher ed., 1994).

²⁰⁰ See BAKELS, *supra* note 17, at 223-25 (explaining that the act is no longer based on the premise that employers and work councils are working nicely together). Moreover, there are vast differences among work councils regarding the degree to which they exercise their legal rights. See *id.* at 248. In general, tenure is given to full-time employees after one year of working in the same company to full satisfaction of the employer.

²⁰¹ See *supra* notes 177-182 and accompanying text for a description of the collective bargaining problems at Philips.

²⁰² See Collins, *supra* note 173, at 2.

²⁰³ See *id.* at 6.

²⁰⁴ See *id.* at 7.

organizing themselves to create countervailing power.

Second, the new workers are predominantly non-white and non-male.²⁰⁵ Thus, the still mainly white, male unions might not be the place to organize. Most of the new workers share the same "identity characteristics"²⁰⁶ and might thus be induced to organize along identity lines. For example, the existence of the Women's Union in the Netherlands suggests that organizing along identity lines might indeed be an option.²⁰⁷ Furthermore, Alan Hyde suggests identity-based employee caucuses as a solution to counter the racist, homophobic and sexist practices of the workplace.²⁰⁸

And, third, Professor Iglesias explains that the problem with collective bargaining is that minorities do not have power within the institutional arrangements of collective bargaining.²⁰⁹ In general, workers are seen as a collective, regardless of race and gender, but the group of workers is split along race and gender lines.²¹⁰ Therefore, she argues that self-representation by minority workers might be more important than "fair representation."²¹¹

The question thus seems twofold: (1) should the new workers organize within or without the union, and (2) should they organize along identity lines or not?

VI. Unions and Identity

The average union member in the Netherlands is a white, male, middle-class, blue-collar worker or civil servant.²¹² The new

²⁰⁵ See CBS 95-96, *supra* note 9, at 41-43.

²⁰⁶ "Identity characteristics" are personal characteristics like sex or race which impact on how individuals view their identities. For example, workers could organize themselves along these identity lines, in women's groups, Turkish groups or lesbian groups, and so on. For a discussion and some examples of organizing around identity lines for women of color in discrimination cases, see Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*, 28 CIV. LIBERTIES L. REV. 395 (1993).

²⁰⁷ See Activiteitenverslag 1994/1995 Vrouwenbond FNV, Amsterdam (report on the activities of the Women's Union).

²⁰⁸ See Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 146-90 (Matthew W. Finkin ed., 1994).

²⁰⁹ See Iglesias, *supra* note 206, at 425-27.

²¹⁰ See *id.* at 428-30.

²¹¹ See *id.* at 457.

²¹² See *supra* note 21 and accompanying text.

worker is a non-white, female, lower class, flexible worker.²¹³ The new worker needs to create some countervailing power in order to achieve better labor conditions.²¹⁴ But will these traditional unions be the way to organize this power, or would organizing along identity lines be a better option?

A. Organizing Within or Without the Union

Collins suggests that, while the problem of exploitation is probably best addressed through unionization, the problems of disrespect and alienation are best addressed by strategies of local-level organizing rather than by industry-wide collective bargaining agreements.²¹⁵ However, it might seem that exploitation is the biggest problem for the "new workers," and that disrespect and alienation follow from the way in which new workers are exploited.²¹⁶ For new workers, their jobs consist of simple work for which no skills are needed except dexterity, and any mistakes can mean the job is over. In my view, this means that disrespect and alienation are everywhere to be seen. The workers who are not members of the core group of employees are exploited, and through that exploitation they are disrespected and alienated. Moreover, it seems that exploitation, disrespect, and alienation are essential characteristics of the types of jobs available to the new worker. Considering the kind of work new workers perform, it is questionable whether a different strategy (for example, organizing along identity lines) would have any effect at all.

Furthermore, because job-hopping and temporary unemployment are also characteristic for new workers, a strategy based on a local approach might be, at best, very difficult. For example, if you work for three months in one company and for four weeks in another company six months later, and if your working hours change every week, you hardly have an opportunity to meet your colleagues long enough to start any organization at all. Furthermore, if individual employers agreed to set some minimum terms for the new workers, such as a minimum contract

²¹³ See Kraamwinkel, *supra* note 188, at 208-09.

²¹⁴ See Collins, *supra* note 173, at 4-5.

²¹⁵ See *id.* at 5.

²¹⁶ See *id.* at 2-4.

duration or a minimum amount of work hours per week, those employers would probably lose their ability to remain flexible and might be afraid of becoming less competitive. This leads to the conclusion that industry-wide agreements would make more sense from the employers' point of view: If the whole industry offers contracts of at least six months duration with at least 20 hours of work a week spread over three days at a maximum, the individual employers that offer those terms on their own initiative would not be disfavored in the marketplace.

This may be even more important in industries consisting of small companies, as they may have more difficulties in surviving the demands of the market. Industry-wide collective bargaining is prominent in Dutch industrial relations and thus, collective bargaining on an industry-wide level fits within existing Dutch industrial relations.²¹⁷ In contrast, big firms have the competitive advantage of economies of scale and, thus, should be able to offer more security to new workers anyway.²¹⁸

The Foundation of Labor has agreed upon securing more rights for flexible workers in a response to proposals by the Minister of Employment.²¹⁹ Also, legal intervention by the state would be an option.²²⁰ This would prevent the development of two separate levels in the labor market: one level of jobs with good labor conditions and fringe benefits in the flourishing industries; and one level of minimal wage jobs, with minimal labor conditions in the sluggish industries.²²¹ However, because deregulation is currently an important characteristic of Dutch social law,²²² and because the general feeling is that the Dutch labor market is far too regulated to be able to function properly,²²³ it is unlikely that

²¹⁷ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 189-90.

²¹⁸ See generally OLIVER E. WILLIAMSON, *ECONOMIC ORGANIZATION. FIRMS, MARKETS AND POLICY CONTROL* (1986).

²¹⁹ See Stichting van de Arbeid, *Nota Flexibiliteit en Zekerheid* [Flexibility and Security], 3 april 1996, (Number 2/96).

²²⁰ See JACOBS & HEERMA VAN VOSS, *supra* note 3, at 71; Stichting van de Arbeid, *supra* note 219, at 27-30.

²²¹ See Stichting van de Arbeid, *supra* note 219, at 25.

²²² See Antoine Jacobs & Willem Plessen, *Deregulering in het arbeidsrecht* [Deregulation in Labor Law], *SOCIAAL ECONOMISCHE WETGEVING*, Feb. 1992, at 83-111.

²²³ See *id.*; see also Frank van Empel, *Flexibilisering gaat veel sneller dan regelgeving* [Flexibilization is Faster than Law-Making], *NRC HANDELSBLAD*, Jan. 17,

initiatives for new legislation without the assent of the social partners, will stand much of a chance. Leaving this kind of problem to the social partners is far more popular these days, which essentially leaves the new worker out of the decision-making arena.²²⁴

If industry-wide collective bargaining would be more acceptable for employers, then the new workers should also engage in organizing industry-wide. The choice for organizing through unions seems almost inevitable. The final remaining question is whether new workers need new unions or can organize within the traditional unions? In other words, should new workers organize along identity lines?

B. Organizing Along Identity Lines

Two developments seem to call for organizing the new workers along identity lines: (1) the existence of the Women's Union in the Netherlands²²⁵ and (2) Hyde's argument in favor of the employee caucuses.²²⁶ Unions are easily organized in the Netherlands and are very influential in shaping industrial relations at a company, industrial and national level.²²⁷ In addition, organizing along a religious or class identity is quite common in the Dutch welfare state.²²⁸ Thus, organizing the new workers along identity lines might coexist well with the national usage of organizing labor.

However, the Women's Union does not present an alluring

1996, at 19.

²²⁴ For example, research shows that women are left outside the process of collective bargaining. See generally M.J. SLOEP, HET PRIMAAT VAN EEN MANNENBOLWERK, EMANCIPATIE IN CAO-ONDERHANDELINGEN [THE STATUS OF MEN'S SOCIETY, EMANCIPATION IN COLLECTIVE BARGAINING] (Emancipatieraad, Den Haag 1996).

²²⁵ The Women's Union (or in Dutch, Vrouwenbond FNV) is hardly ever mentioned in any research on trade unions. For instance, in the most recent volume on unions in the Netherlands, the women's union is not mentioned even once. See Klandermans & Visser, *supra* note 3. Information on the Women's Union can be found in the bylaws of the union, in the bimonthly journal called Binding (Bond) and in the biannual reports on activities, which are published by the Vrouwenbond FNV, which has its registered office at Amsterdam.

²²⁶ See Hyde, *supra* note 208, at 184-90.

²²⁷ See *supra* notes 17-114 and accompanying text.

²²⁸ See *supra* notes 97-99, 133-35 and accompanying text.

example of how identity caucuses might be formed. The Women's Union is not involved in collective bargaining and, thus, has relatively minimal influence on the politics of the central organizations of trade unions.²²⁹ It is the smallest union in the country and generally resembles an interest group more than a union.²³⁰ The Women's Union organizes conferences on women's issues and tries to persuade the press to publish stories involving women's issues. Recent issues for such conferences have included poor women, the decline of the welfare state, and the consequences of the European Union for women. Furthermore, the Union writes letters to parliament and the government on these issues.

The Nurses Union (NU '91), which grew out of wildcat strikes²³¹ by the lowest ranking nurses in the late-1980s, seems to have been more successful than the Women's Union. It is now part of the collective bargaining "circus" in the health sector and is treated as a valuable asset to the bargaining table.²³² Apparently, organizing along identity lines in a union is less effective than organizing around a certain type of work, which might lead to reluctance to organizing the new workers along identity lines in favor of organizing around job type, as the nurses did.

Hyde suggests employee caucuses organized along identity lines as a good way of countering racist, homophobic and sexist practices in the workplace.²³³ For the "new worker," however, with her flexible contract, any organizing activity might induce repercussions in the form of job dismissal. Thus, before becoming active in a caucus, new workers should gain some kind of job security. But even if the new workers had this job security, it is questionable whether organizing along identity lines would be preferable to organizing in another way.

First, there are other arguments against organizing along

²²⁹ See Statuten [bylaws] Vrouwenbond FNV, para. 2-2.

²³⁰ See Activiteitenverslag 1994/1995 Vrouwenbond FNV, Amsterdam (biannual report on activities of the union) and the bylaws, especially para. 3 stating the means with which the union is to achieve its goals.

²³¹ A wildcat strike is a strike that is not organized by a union.

²³² For instance, they are involved in bargaining about the pension plans and collective agreement in the health sector.

²³³ See Hyde, *supra* note 208, at 147-51.

identity lines. For example, Molly McUsic and Michael Selmi argue that the common bond among workers is the absence of power in the workplace and that absence of power exists in a manner that best furthers the interests of workers.²³⁴ The interests of workers will, of course, often conflict over certain subjects, like part-time work and seniority provisions, but this does not mean that no common ground can be found by workers.²³⁵ When conflicts arise, however, it is important that minority groups are not asked to subvert their will and interests to the majority.²³⁶

Second, in advocating for identity caucuses, one must address the issue of how new workers would define themselves in any given situation.²³⁷ For instance, women workers might be more interested in protesting *against exploitation* generally than in protesting *as women*, when it comes to their position in the labor market and the jobs they hold. If that is indeed the case, organizing along gender identity lines does not make much sense.

Furthermore, groups based on one identity characteristic seem to subvert all other differences between the group members.²³⁸ One identity, often enforced by a lot of unwritten but strong guidelines for behavior, will be the essence of the group. However, an individual's identity is generally constructed around several identity characteristics, such as sex, race, and class. But in an identity group, only one identity is central and perceived as the core identity. In a group, this core identity influences ideas about how to behave.²³⁹ For example, a lesbian of color will have to act as a woman in a women's group, as a person of color in a racial group, and as a lesbian in a gay and lesbian group, thus in each group giving up all other parts of her identity to fit the identity

²³⁴ See Molly McUsic & Michael Selmi, *Postmodern Unions, An Essay*, IOWA L. REV. (forthcoming 1997) (paper on file with the author).

²³⁵ See *id.* at 59.

²³⁶ See *id.* at 58-60.

²³⁷ The author owes this insight to Hugh Collins' comments on the draft of this paper.

²³⁸ See Margriet Kraamwinkel, *Heaven is Only Half the Distance . . . Women's Position in Supplementary Pension Schemes: Unsettled Business for the Nineties*, in LABOUR MARKET INEQUALITY BETWEEN MEN AND WOMEN: CURRENT ISSUES IN LAW AND ECONOMICS 35, 46-47 (B. Hessel et al. eds., 1996) [hereinafter *Heaven*].

²³⁹ See *id.* at 47.

caucus. Moreover, what if she is perceived not to behave like a "real woman" in the women's group, but is instead perceived as emphasizing her lesbian identity?

In the context of addressing gender discrimination, a group-based approach has often been used.²⁴⁰ But the emphasis on the group character of discrimination and equality has its own problems. It takes the interpretation of *woman*, the meaning of *femininity*, for granted. It does not discuss the meaning of these words and accepts them as a common denominator. However, women differ from one another, as do people of color and all the other possible identity groups. Those differences are more than the somewhat obligatory differences of gender, race, class and sexual orientations which have far more effect than this mantra seems to recognize. To me, it seems as though these rather complicated problems are seemingly solved by adding the following after "women": "whatever their differences in race, class, and sexual orientations may be." Used in this sense, identity is no more than a ritual without meaning. For instance, identity is also influenced by other factors, such as whether you are unemployed, or married, or a single mother, or the victim of sexual harassment, or living in a rural area.

Recognizing differences between members of an identity group means also acknowledging that the dominant subgroup can set the terms for the discussion on the group's problems and define what those problems really are.²⁴¹ In other words, there are hierarchies and power relations within every group.²⁴² Ignoring those hierarchies means ignoring the fact that some group members have far more power to define group problems than others. Organizing around identity lines presents many problems which difficult to overcome. Furthermore, new workers have specific labor-related problems.

Because the question for the new worker is how to address exploitation, disrespect and alienation, it seems to make more sense to organize around actual and experienced problems, rather

²⁴⁰ See *id.* at 44-45.

²⁴¹ See Sarah van Walsum, *Het machtskarakter van het cultuurdebat* [Power Aspects of the Culture Debate] 2 NEMESIS.12, 12-17 (1996).

²⁴² See *id.*

than around identity lines. To illustrate, I will use the example of sexual harassment at work. Sexual harassment, at first glance, may seem a typical problem for women at work and thus be a very good topic around which to organize women. Even if sexual harassment is one of those actual and experienced problems of women *at work*, the context of the harassment would be the work environment and the work might be severely hampered by the harassment. Thus, even an actual and experienced work-related problem, which in a particular case typically only women encounter, also has work-related aspects—that is, harassment happens *at work* and may effect the atmosphere *at work*. This means that, although it could be attacked by organizing around identity lines, sexual harassment could also be attacked by organizing around issues that affect the work environment for employees. In the latter case, the approach would be centered around workers who cannot work at their most productive level because they are harassed while working.

The same argument can be made for attacking racism or homophobia at work. This means, however, that the new workers should be able to learn from each other's experiences and be able to support one another in putting some more "identity-oriented" problems on the agenda. Thus, men should be willing to support the struggle against sexual harassment, and white workers should work against racism in the workplace. This is not easy because each group prioritizes work-related problems differently. For instance, women may place a priority on sexual harassment problems, while gay men may find homophobia the most important issue. However, sexual harassment, homophobia and racism all generate hostility against those who are different—that is, those who are not straight, white, middle-class males. This hostility can be directed against any of those who do not belong to the straight, white, middle-class male group. Struggling against this hostility as a unified group is important for all the "others," because in that way, a common ground between all the new workers can be found. In contrast, struggling against practices that only concern one identity group may result in a redirection of the hostility towards the other groups and will not solve the basic problem: the hostility of straight, white, middle-class males toward "others." Furthermore, it also offers those straight, white, middle-

class males who are willing to combat existing sexism, racism and homophobia a possibility to join the struggle for a better workplace.

The final question here is why traditional unions could be a good place in which the new workers could organize.²⁴³ Apart from the opportunities to work together with all those who are willing to struggle against sexism, racism and homophobia, unions give workers the opportunity to develop countervailing power together. On the one hand, inclusion into the broad labor movement may magnify the political influence of new workers through the existing influence of the unions. On the other hand, it might indeed help "old workers" to convert from a position of indifference to one of active support. As more "old workers" are in a position where they might have to share more of the securities of "new workers," this might even lead to a more vigilant union when it comes to labor conditions.

VII. Organizing the "New Worker" Within the Traditional Union

Above, I have argued that unions need the new worker and that the new worker needs the union. The traditional union and the new worker seem forced by the economic and social developments to work together. This does not mean, however, that some easily-reached recognition of diverse identity is possible within traditional unions, or that the traditional unions are well equipped to address better labor conditions for the new worker. Union members, including union executives, can be as sexist, racist and homophobic as any other worker, and reaching flexible workers is a difficult undertaking.²⁴⁴ The question that remains for unions is

²⁴³ The author owes these insights to the comments of Harry Arthurs on a draft of this essay; *see also* PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 184-86 (1990) (concluding that collective bargaining in a union structure seems the best way to protect workers' influence on their work).

²⁴⁴ At an Amsterdam meeting of the *Industriebond FNV*—the largest union of workers in plants and small companies working in the field of steel production and tooling—on November 5, 1996, a member working in the cleaning sector explained the difficulties in reaching flexible workers as follows: They work at different places each night and have variable working hours. As such, there is no canteen or break-room where flexible workers in this sector all take work breaks and can meet each other. Furthermore, they often work alone.

how to organize the various groups of workers, while the question that remains for new workers is how to organize *within* the union. In other words, how can unions try to establish union policy to address the needs of the various groups, and what is the place for identity politics within unions? In this last section of my essay, I will address these questions.

A. Organizing the New Worker

Due to the flexible nature of her contract, the new worker is hard to reach. I have argued that in small-scale industries consisting of relatively small firms scattered over the country, industry-wide collective agreements would probably be preferred by employers to prevent competitive disadvantages.²⁴⁵ As most of the new workers work for several companies in the same industry, industry-wide collective bargaining seems a good alternative for the workers as well.²⁴⁶

For example, consider the experiences in organizing Dutch retail workers. A lot of flexible contracts are found in retail.²⁴⁷ The best way for unions to attract new members seems to be through achieving better labor conditions. Therefore, when the opening hours of shops—heavily regulated until June 1, 1996—were to be deregulated, the unions started demonstrations. The unions wanted to prevent employees from being required to work night shifts, further stating that everyone had a right to be home at six o'clock. Because a lot of women work in retail, the unions claimed that it was even more important for women workers to be home at six o'clock, because they had to cook dinner. One union leader claimed that the opening hours were only deregulated to make it possible for rich, commuting “dinkies” (dual-income, no kids) to do their shopping at a convenient time. The union leaders claimed that the workers wanted to be home at six for dinner.

²⁴⁵ See *supra* notes 36-43 and accompanying text for a description of the advantages of industry-wide collective bargaining.

²⁴⁶ Employees with flexible labor contracts include women, see CBS 95-96, *supra* note 9, at 41; the uneducated, see *id.* at 42; and immigrants, see *id.* at 43. They work in agriculture and in the hotel and catering industry. See *id.* at 44. Those employees who work irregular times (like evening and night shifts) often have a flexible labor contract as well. See *id.*

²⁴⁷ See *id.*

However, the unions realized the difficulty in getting flexible workers to strike, as such workers are afraid of being punished after the strike is over. Therefore, the unions tried to organize relay-strikes²⁴⁸ and short-term strikes of a few hours at a time in retail. This was unsuccessful because the workers did not want to make the clients suffer and were afraid of getting fired. In addition, many students working in retail did not mind working late hours, because that made it possible for them to attend their classes during the day.

During the demonstrations, only (white, male) union leaders were seen on television arguing that deregulating opening hours would be a disaster for the families of the retail workers. The women working in retail were not interviewed. The union meetings were not joined by the masses of retail workers that saw their working hours being changed, leading one to wonder whether those retail workers were so opposed to deregulating the opening hours. It seems as though the unions thought this might be a chance to organize retail and just picked one problem from the masses of problems retail workers encounter. For example, an arguably far bigger problem in retail is the insecurity of the contracts. I would assert that people do not mind working at night as much as they mind not knowing whether they will have work at all.

The Dutch retail worker example underlines the proposition that it makes more sense for unions to start a dialog with "new workers," to determine what issues most affect them, than to simply impose an external interpretation of what would best meet their needs. For example, Dutch journalist Stella Braam interviewed workers in cleaning, catering services and similar jobs.²⁴⁹ Working undercover, she was able to sketch an impressive narrative about the lives at "the bottom of the labor market."²⁵⁰

²⁴⁸ A relay strike is a short-term strike; for instance, there might be a one hour strike in a company, after which the next company takes over, and so on. In the retail example, relay strikes involved shop number one being closed from 9 to 10 a.m., shop number two from 10 to 11 a.m. and so on.

²⁴⁹ See STELLA BRAAM, *DE BLINDE VLEK VAN NEDERLAND, REPORTAGES OVER DE ONDERKANT VAN DE ARBEIDSMARKT* [THE BLIND SPOT OF THE NETHERLANDS, REPORTS FROM THE BOTTOM OF THE LABOR MARKET] (1995).

²⁵⁰ See generally *id.*

The cleaning sector is covered by an industry-wide collective labor agreement.²⁵¹ In this sector, neither the statutory health regulations nor the labor conditions in the collective agreement are followed.²⁵² People are forced to work with dangerous chemicals without so much as plastic gloves or other protective garments.²⁵³ In addition, most of the workers in the sector are underpaid.²⁵⁴

When Braam succeeded in motivating a group of Turkish workers to go to the union and ask the union to help them improve their labor conditions, the union was unable to produce a Turkish translation of the collective labor agreement.²⁵⁵ Moreover, the union thought the problems the group faced were far too complicated. Further, the union was not as eager to help because the Turkish workers had just recently become union members.²⁵⁶

Another report, by order of one of the unions, on the cleaning sector shows that in this sector 75% of the workers are female and around 66% are minimally educated.²⁵⁷ The workers have a lot of complaints regarding labor conditions, such as wages, dismissal, holidays and the like.²⁵⁸ The terms of the collective agreement are unknown by workers.²⁵⁹ Those complaints are not voiced to the union because individual women workers did not know others faced the same problems and were afraid they would not to be taken seriously—or worse—were afraid of “trouble.”²⁶⁰ Women who did complain to the employer were not taken seriously in most cases.²⁶¹ Further, women did not go to the work councils

²⁵¹ See the collective labor agreement in the cleaning sector (or in Dutch the Schoonmaak CAO) concluded by the OSB, the employers organization in the cleaning sector and several unions working in the cleaning sector.

²⁵² See BRAAM, *supra* note 249, at 95-96, 98-99; Kea Tijdens & Noor Goedhart, *kwiteit van de arbeid en de rol van de vakbond in de schoonmaaksector* [Quality of Labor and the Position of the Union in the Cleaning Sector], 12:1 TIJDSCHRIFT VOOR ARBEIDSVRAAGSTUKKEN 31-42 (1996).

²⁵³ See BRAAM, *supra* note 249, at 93-124.

²⁵⁴ See *id.*

²⁵⁵ See *id.* at 117.

²⁵⁶ See *id.* at 123-24.

²⁵⁷ See Tijdens & Goedhart, *supra* note 252, at 34.

²⁵⁸ See *id.* at 35.

²⁵⁹ See *id.*

²⁶⁰ See *id.* at 38

²⁶¹ See *id.*

with their complaints, because there were not many work councils in this sector, even though work councils are mandatory.²⁶² On the other hand, the female union members who went to their union were fairly satisfied by how the union dealt with their complaints.²⁶³ In these cases, a union executive mediated between the workers and management.²⁶⁴ However, because the number of union members in the cleaning sector is low, this satisfactory result was significant for very few of the workers.²⁶⁵

Thus, it seems that access to information by workers in the cleaning sector regarding the collective labor agreement is essential to the utilization of that agreement. Additionally, there are complaints and worker resistance against employers and their practices in the cleaning sector, which probably also arise in retail and in other industries with a lot of "new workers." Unions should be able to find ways to trace this resistance and to connect with the existing problems faced by the new workers, instead of dictating to the new workers what their problems are.²⁶⁶

Moreover, the women in the example of the cleaning sector workers preferred to complain together.²⁶⁷ This suggests that unions should facilitate some way of getting new workers together, for example inviting women to come during union consultation-hours to discuss common problems. As stated above, workers responded positively to union mediation in the example of cleaning sector employees, which suggests that the union has more roles to play than simply facilitating group meetings. If new workers would accompany the union to complain about particular labor conditions, their complaints would probably be taken more seriously by their employers. Also, accompanying the union might also mean fewer repercussions from the employers directed towards individual workers.

In this way, a local approach could be developed by the unions in organizing the cleaning sector and preventing employer

²⁶² *See id.* at 39.

²⁶³ *See id.*

²⁶⁴ *See id.* at 39-40.

²⁶⁵ *See id.* at 40-41.

²⁶⁶ *See generally* Tijdens & Goedhart, *supra* note 252.

²⁶⁷ *See id.* at 38.

repercussions. Furthermore, the union would ask the workers to define the problems they encounter, instead of defining the workers' problems for them. Unions need to learn to listen. This approach can be seen as a combination of a local approach and a strategy involving collective bargaining and might, thus, overcome the problems of trying a single strategy.

B. Within the Traditional Union

To be truly influential within a union, workers must at least go to some, if not most, of the meetings organized to decide on the direction to be taken in the collective bargaining process. Further, becoming active as an executive in the union, for instance, leads to more influence in the union. This however, takes time, and thus might be difficult for "new workers"—especially for women, who often are responsible for household tasks.

If the new workers want to get their problems on union agendas, they should become active within the unions. This might be difficult, as I said above, so I would suggest that a twofold approach is necessary. (I will return to what unions can do below.) Above, we saw that the unilateral take-over by unions of the supposed problems facing retail workers was unsuccessful for the unions.²⁶⁸ Apart from the role unions must play in the process of addressing the needs of the new workers—which is to listen to new workers instead of dictating to them—the new workers also have a role to play. The first step, obviously, is to become union members and go to union meetings.²⁶⁹ The next step would be coming together as union members working in the same sector or for the same company. But if women do not know who among them are members, or do not know who the other members are, this second goal might be hard to realize.

Maybe there is a role for the unions in the Netherlands. As I suggested above, if unions would organize consultation hours or meetings for women or for those working in a specific company or

²⁶⁸ See *supra* notes 247-49 and accompanying text for a description of the unsuccessful organization of retail workers.

²⁶⁹ A lot of women are already joining unions. The absolute growth in union members is caused by women. See VROUWENSECRETARIAAT FNV, 8 MAART ENQUÊTE 1992 (Amsterdam 1993).

sector, this might be a way to reach the new workers and for the new workers to meet each other. In that way, unions and the new workers could work together in trying to achieve better labor conditions.

VIII. Conclusion

Unions are extremely influential in sectors and companies where collective labor agreements are reached. Due to the politics of deregulation, it seems that these collective agreements are becoming more important to establish better labor conditions.²⁷⁰ But although 70% of the Dutch workforce is covered by a collective agreement, there is also 30% that is not.²⁷¹ Of this 30%, a large portion is comprised of "new workers." For those workers, the law sets the minimum standards. Most of these workers are working in small companies with just a few employees. The workers in these small companies are probably very difficult to organize, because they work closely together with the owner-employers and may fear direct repercussions if they were to become active in unions. Furthermore, workers in these underrepresented areas do not have many job opportunities, as they are often barely educated and have limited skills related to the job they have.²⁷² However, union activities seem essential for these groups. These groups might be the most difficult for unions to reach and it is most difficult for the members of these groups to reach each other, but this does not mean that they can (or should) be left to the "safety net" provided by the welfare state. This is even more important now that the safety net is not in the healthy state is used to be.²⁷³ Here again, I would suggest that it is essential for unions to listen to the problems these groups of workers encounter and develop a "workers' voice." New workers working in bigger companies or in sectors that are covered by collective agreements face the same problems as workers in small companies. Although in some cases the collective agreement

²⁷⁰ See *supra* footnotes 96-114 and accompanying text.

²⁷¹ See *supra* note 35 and accompanying text.

²⁷² Employees with flexible labor contracts are generally less educated workers. See CBS 95-96, *supra* note 9, at 42.

²⁷³ See, e.g., ROEBROEK, *supra* note 57, at 172-74.

should be applied to the new worker's contracts, it is not always done. New workers, as described above, seem to find it difficult to face the employer and to ask for higher wages.²⁷⁴

The new workers are able to define their own problems, and a union strategy based on determining existing, instead of imagined, problems or those defined by the unions might both enhance the position of the unions and of the "new workers." This last point seems most important so long as unions believe they can act in the best interest of the new workers without asking whether the new workers want union representation.

At a recent meeting of a large union, I talked to a few union members working in the cleaning sector. They had clear ideas about how to reach their colleagues. For instance, they suggested radio broadcasts, as they often have radios on while they work. Furthermore, they insisted on education organized by the union, to make their co-workers feel more self-assured and thus more willing to go and discuss wages and labor conditions with their employers. My conversation partners, however, did not feel they could explain their ideas in the larger union assembly, held later that afternoon. They were all from Turkish or Moroccan descent and did not feel their Dutch was good enough to address the group of eighty union members. At the same table where we were discussing these ideas, a member of the board of the Union was seated. Within five minutes, however, he was called away for an urgent phone call. As long as union officials and members of the board do not have time to sit down and talk with their members, these ideas will end up in dusty drawers, if they reach the union at all.

Furthermore, as more workers in the future will undoubtedly be working on flexible contracts (which means they will fall within the same group of workers as the "new workers"), unions will have an interest in paying more attention to these groups because it will allow the unions to grow. As we have seen, workers only become union members when they perceive concrete results can be gained from the unions.²⁷⁵

²⁷⁴ See *supra* notes 268-76 and accompanying text for a description of the problems of new workers and the difficulties they face in approaching their employers.

²⁷⁵ See *supra* notes 18-20 and accompanying text..

The new workers cannot afford to work in small identity groups and the unions cannot afford to neglect this growing part of the workforce. Working together, new workers and traditional unions can achieve better labor conditions for the "new workers." They can also join forces in combating the hostility of the "old workers"—the straight, white, middle-class males.²⁷⁶ With the workforce becoming more heterogeneous, it is essential to create "workable" work for all.

²⁷⁶ See *supra* note 212-14 and accompanying text.

